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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

VERNON LEE MULLEN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether or not Petitioner was denied due process by the Lower Court's admission into evidence of items, allegedly taken during a voluntary search of Petitioner's residence, where the United States Government failed to provide said evidence to Petitioner's counsel before trial pursuant to Petitioner's Rule 16 F.R.C.P. pre-trial motion and order entered by the United States Magistrate.

(2) Whether or not the pre-trial suppression of documents by the United States Government and the subsequent attempt of the Government to introduce said documents at trial, is cause for reversal, where the Lower Court Judge allowed testimony regarding the content of said documents and overruled Petitioner's Motion for Mistrial.

(3) Whether or not the Lower Court committed prejudicial error in ruling that an adding machine tape is not a document within the purview of Rule 16 F.R.C.P. and allowing said tape, which supported the testimony of Government witnesses and which was not provided to Petitioner's counsel before trial, into evidence.

(4) Whether or not Petitioner was prejudiced by the testimony allowed by the Lower Court regarding alleged drug activity outside of the indictment term of May 1 through May 4, 1981, such that Petitioner's conviction should be overturned.

(5) Whether or not the failure of the United States Government to provide Petitioner's counsel with evidence containing a telephone number, prior to trial, resulted in prejudicial error where the Lower Court allowed testimony regarding the telephone number and ruled that such evidence would only be afforded to an accused in a murder case.

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INTRODUCTORY STATEMENT

The Petitioner, Vernon Lee Mullen, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, not yet reported, on February 13, 1984, which affirmed judgment against Petitioner entered on July 8, 1983, by the United States District Court for the Southern District of Mississippi. The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is appended, bound with this Petition, and marked as Appendix "A".

Petition for Rehearing and Suggestion for Rehearing En Banc were denied by the United States Court of Appeals for the Fifth

Circuit on March 12, 1984, and the Order denying Petition for Rehearing is appended, bound with this Petition, and marked Appendix "B".

A Motion for Stay of Mandate was filed on March 16, 1984.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment and commitment order entered on July 8, 1983, by the United States District Court for the Southern District of Mississippi, affirmed by the Court of Appeals for the Fifth Circuit on February 13, 1984, and the Order of said Court denying Petition for Rehearing dated March 12, 1984.

Petitioner believes that this Court has jurisdiction to review said judgment by Writ of Certiorari by virtue of 28 United States Code, Section 1254.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Relevant to the decision of the case is the Fifth Amendment to the United States Constitution and Rule 16 of the Federal Rules of Criminal Procedure.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 16(1)(C), Federal Rules of Criminal Procedure (Pre-trial Discovery) provides:

> (C) DOCUMENTS AND TANGIBLE OBJECTS: Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

STATEMENT OF THE CASE

Petitioner, Vernon Lee Mullen, and Anse Garth, Jr. were indicted by the Grand Jury for the United States District Court for the Southern District of Mississippi, Jackson Division, on or about July 30, 1982. The indictment charged that during a period from May 1 through May 4, 1981, in Copiah County, Mississippi, in the Jackson Division of the Southern District of Mississippi, and elsewhere Petitioner and Garth knowlingly and willfully conspired with others to distribute and possess with intent, cocaine, a Schedule II(a) narcotic drug, and marijuana, a Schedule I(c) non-narcotic controlled substance in violation of Section 841(a)(1), Title 21, United States Code. The indictment further charged that as part of the conspiracy, on May 4, 1981, Petitioner did provide co-conspirators, including Defendant Garth, approximately 98 grams of cocaine for sale to third persons, all in violation of Section 846, Title 21, United States Code.

Before trial Petitioner filed several discovery motions, including a request pursuant to Rule 16 of the Federal Rules of Criminal Procedure. The United States Government moved to compel reciprocal discovery. An Order regarding discovery was executed August 31, 1982, and filed September 1, 1982.

Pursuant to said Order and on or about September 30, 1982, attorneys for Petitioner met with DEA agents at a conference set up by the United States Attorney's Office and were provided copies of what was supposed to be the evidence to be introduced at trial by the Government. Five pieces of evidence were suppressed by these agents at the meeting but at trial the Government attempted to introduce the same.

Trial was held before United States District Judge William Harold Cox and a jury in Jackson, Mississippi, on April 26 through 28, 1983, and the Petitioner, Mullen, and Garth were convicted.

The Government presented five witnesses who testified as to Petitioner's activities regarding marijuana and cocaine sales. Only three actually knew and could identify Petitioner.

On witness, Gary Whited, testified that he was a drug salesman who dealt with Petitioner on several occasions prior to May 4, 1981. He stated he phoned a man by the name of Vernon (Petitioner's name) and recognized Petitioner's voice on the telephone. He further testified that he had gotten Petitioner's telephone number off a box lid that was kept to put money in from drug sales.

Objection was timely made to this testimony by counsel for Petitioner. The prosecution had not furnished any name to Petitioner regarding such evidence (which precluded cross-examination) and the prosecution had not revealed such evidence to Petitioner's counsel pursuant to the discovery order entered by the United States Magistrate.

The objection was overruled by the Lower Court Judge who stated that the prosecution did not have to give the evidence to Petitioner unless the case was a murder case. The Lower Court then proceeded to hear further testimony concerning the telephone number.

Whited testified that on May 4, 1981, he, along with others went to Petitioner's house and Petitioner said he had three

ounces of cocaine for Whited's purchasers. Whited went on to describe the alleged transaction and stated that the Petitioner had an adding machine in his house. Whited also stated that the Government agreed not to prosecute him if he testified for the Government and that he had been convicted of other crimes.

Agent Steve Mallory, a lieutenant with the Mississippi Bureau of Narcotics, testified that he was part of the investigation; that he requested that Whited call Petitioner; and that he was part of a search party that arrived at Petitioner's residence on May 4 at 6:00 p.m. He stated that Petitioner agreed to a permissive search and the consent of search was entered into evidence.

William Taylor, a Mississippi Highway Patrol Trooper, who worked for the Mississippi Bureau of Narcotics on May 4, 1981, testified as to the search of Petitioner's master bedroom. He related that he received some tapes and that there was an adding machine sitting on the desk in the bedroom. He said there were telephone bills, memo notebooks with names in them, and telephone numbers. These things had been turned over to the United States prosecutor the evening before the trial.

Taylor was questioned by the Government about the adding machine tape and the other evidence allegedly found in Petitioner's residence. Counsel for Petitioner objected on the ground that the prosecution had not allowed Petitioner to inspect the evidence prior to trial in accordance with Rule 16, F.R.C.P. The Court stated it did not consider an adding machine tape as a document and overruled the objection. Taylor was allowed to testify as to the relationship between the numbers on the adding machine tape and the amount of money involved in the drug transaction. Counsel for Petitioner again stated an objection but the Court allowed the tape into evidence.

Taylor stated the search revealed telephone bills from the month of March, 1981. Petitioner's counsel objected stating that during discovery telephone bills were furnished through February, but not for the months of March, April or May.

Upon Petitioner's objection to this evidence, the Court ruled that a telephone bill was a document and the objection was sustained.

Taylor described the finding of two memo books and a telephone address book in Petitioner's residence and the Court then allowed the telephone bills, which had been objected to by Petitioner's counsel with the objection being sustained, to be marked for identification and the jury heard Taylor tell that the significance of the memo aids was that it had Gary Whited's name on it along with Brian's Trailer Park and Foster Forehan's name. Petitioner's counsel objected, stating that those items were suppressed by the Government prior to trial in disregard of the discovery order. Counsel for the Government offered the items in evidence for identification and the witness continued to explain what was in the book.

Another book was offered for identification and once again the Court asked the witness to explain it and the witness testified before the jury that it contained the names of Foster and Whited and that it was found on the desk by the adding machine. Counsel for Petitioner attempted to move for a mistrial and the Court stated he would be allowed to do so later.

Another memo note pad was then marked as an exhibit for identification, with the same objection by Petitioner's counsel, and a black address telephone book was offered for identification. The Court received same.

The Court was requested to instruct the jury to disregard the witness' statements. The Court instructed the jury not to pay any attention to anything except what they read and saw but it did not instruct the jury not to pay any attention to what they had just heard.

Taylor next testified to several paraphernalia objects found in the house, none of which were shown by the witness or any other witness, to have any relations to the offense described in the indictment.

The Government rested.

Motion for mistrial was made by Petitioner's counsel and overruled by the Court. Motion for judgment of acquittal on the grounds that the evidence was insufficient to convict the Defendants beyond a reasonable doubt, considering the evidence in the most favorable light to the Government, was made and overruled. Petitioner rested.

The Defendant, Garth, called Richard Belding, a deputy sheriff of Copiah County, Mississippi, who testified that Whited, while incarcerated in the Copiah County jail, wrote on an envelope a message to Defendant Garth, an alleged admonition "My people will take care of you". Belding admitted the accusation could be interpreted as an accusation of one inmate against another. This evidence was in contradiction of the Government's witness, Whited.

Sheriff Tommy Jackson of Copiah County, Mississippi, testified that Petitioner would not talk to him about the case and on cross-examination stated that he had known Petitioner for fifteen years and that Petitioner had had no problem with the law at any time regarding peace and violence.

Defendant Garth rested.

The Court instructed the jury after final arguments on April 18, 1983, and Petitioner objected to three instructions.

The jury returned a verdict of guilty as to the two Defendants on April 28, 1983. On July 8, 1983, the Court sentenced Petitioner to 12 years in prison and a fine of $15,000.00, said sentence entered by order on the 19th day of July, 1983.

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit which affirmed Petitioner's conviction.

Petitioner then petitioned for rehearing and filed a Suggestion for Rehearing En Banc. Both were overruled on March 12, 1984.

A Motion for Stay of Mandate was filed on March 16, 1984.

REASONS FOR GRANTING THE WRIT

Petitioner believes this case furnishes the Court with unresolved issues affecting the protection of the Petitioner's Constitutional rights.

Petitioner's Argument addresses the issue of a Defendant's pre-trial right to inspect the evidence to be introduced against him at trial by the prosecution; the failure of the prosecution to comply with a rule 16 F.R.C.P. discovery order; and the prejudice Petitioner suffered as a direct result of the Government's failure to comply.

In the instant case Petitioner's counsel filed a proper and timely Rule 16 Discovery Motion which was granted by the United States Magistrate by order. Petitioner's preparation of defense encompassed only the evidence turned over to Petitioner's counsel prior to trial. This did not include an adding machine tape with numbers on it relating to the cost of drugs involved in the crime with which Petitioner was charged. This did not include telephone and memo pads supporting the key witness for the Government. Petitioner was denied his right to prepare a response or defense to this evidence and was fatally prejudiced by the Lower Court's decision to allow the tape into evidence and to hear testimony regarding the items which were not admitted into evidence.

Petitioner believes the Lower Court committed prejudicial error in overruling Petitioner's objections to the introduction of vital pieces of evidence which were suppressed by the Government prior to trial. Petitioner was unaware that several items alleged to have been taken during a voluntary search of Petitioner's residence were in the hands of the Government until trial. These were the very items which gave credence to the testimony of the Government's key witness, an admitted convict and drug salesman granted immunity in exchange for this testimony. The evidence was the basis of Petitioner's conviction.

For these reasons Petitioner was in effect denied due process of law, the benefit of a fair trial, and is in need of this Court's protection of his constitutional rights.

ARGUMENT

This is a case which concerns the construction and application of pre-trial discovery rights of the Petitioner Mullen, and in particular, Rule 16(a)(1)(C), F.R.C.P.

In the case at bar, pursuant to timely discovery motions, the United States Magistrate entered its order regarding discovery on August 31, 1982, the same being filed on September 1, 1982. The order said that the Government would provide the defendant all evidence described in Rule 16(a),(1), (A), (B), (C) and (D), F.R.C.P., and all information accumulated during the investigation of the matter, which consisted of Brady exculpatory material. Paragraph (c) of said order stated that the Government would provide the Petitioner with a designation of specific items the Government proposed to introduce as exhibits during its case in chief, three (3) working days prior to trial on the merits.

Pursuant to this order and arranged by the United States Attorney's Office, Petitioner's counsel met with the local Drug Enforcement Administration Agents on or about September 30, 1982, and were afforded a view of evidence. Petitioner's counsel was allegedly given copies of all of the evidence the Government intended to use against Petitioner at trial.

Prior to trial, Petitioner's counsel knew of no telephone calls between Petitioner and the Government witness, Whited, or any evidence that would support Whited's remarks and implicate Petitioner.

The Lower Court's disposition regarding Rule 16 commenced in the early stages of the trial when alleged co-conspirator Whited made statements outside the purview of the indictment and further commenced to testify about a telephone number

that he obtained off of a box lid pertaining to other drug sales. Objection was properly made concerning matters outside the indictment and the Rule 16 violation. The Court ruled that any discovery matters referred to would not have to be placed before Petitioner unless it was a murder case. Evidently, the Court felt that the Petitioner, as a non-accused murderer, had no right to discovery before trial.

Thereafter, and throughout the trial, the prosecution commenced to emphasize that the price of the contraband cocaine in question was the sum of $5,700.00. This figure is documented in evidence throughout the trial eighteen (18) times. Petitioner's counsel did not realize the significance of this amount of money until Trooper William Taylor was called to the stand and alleged that he had found an adding machine tape in the adding machine sitting on Petitioner's desk in the master bedroom. Instantaneously the Court was advised that Petitioner's counsel had not seen such evidence and timely objection was entered. The Court held that the adding machine paper was not a document and the objection was overruled.

The witness was then allowed to testify before the jury concerning the information contained on the adding machine tape and the Government introduced the tape during its case in chief.

The Government had not furnished the tape to Petitioner before trial and Petitioner was extremely prejudiced by its introduction and the testimony surrounding it. The tape was a discoverable tangible piece of paper, material to the preparation of Petitioner's defense, and the introduction of said tape changed the entire defense strategy. Petitioner had no indication said tape was in the custody and control of the Government by virtue of Agent Taylor's search of his residence.

The Government then attempted, through Taylor, to introduce telephone bills for the months of March, April and May, 1981, and upon objection to this evidence as being suppressed by the Government in face of the pre-trial discovery order, the Court ruled that they *were* documents and objection was sustained.

Taylor then testified that he had found two memo books and a telephone address book in Petitioner's residence. Over objection of the defense, the Court did not allow the memo pads to go to the jury, but did allow them to be marked for identification. Even after sustaining the Petitioner's objection to this evidence, the Court allowed the witness to testify orally about the contents of the memo pads. Counsel for Petitioner attempted to move for a mistrial without success.

Petitioner believes that he would not have been convicted on the evidence of Whited alone, without the words of Taylor revealing to the jury a connection between Petitioner and Whited, and without the adding machine tape, which supported his oral testimony as to the price he would receive for the three ounces of contraband.

The Court committed error in allowing the introduction of evidence suppressed by the Government before trial and in allowing testimony regarding said evidence. The Court should have prohibited the United States Attorney from introducing the evidence or, at the very least, granted Petitioner a continuance until further discovery could be had. These very rules have recently been promulgated by the Fifth Circuit Court of Appeals in *United States v. Sarcinelli*, 667 F.2d 5 (5th Cir. 1982).

In the case at bar, the District Judge, upon learning of the failure to comply with the F.R.C.P. Rule 16 Order did not require the United States Attorney to permit the discovery or inspection and further did not grant a continuance or hiatus period and did not prohibit the United States from introducing the evidence which was disclosed to the Petitioner. The adding machine tape was admitted and carried to the jury room and the other tainted documents, even though kept out of the jury room, were brought to the attention of the jury by the Lower court allowing oral testimony concerning the information in the documents. When the Court was asked by the Petitioner's counsel to instruct the jury to disregard what they had heard from the stand, the Court instead advised the jury that they

should not pay attention to anything but what they read and saw. Petitioner was denied a fair trial.

The extension of F.R.C.P. Rule 16(a)(1)(C) incorporated the *Brady* rule with respect to documents and tangible objects. See *United States v. Countryside Farms, Inc.*, 428 F.Supp. 1150 (U.S.D.C. Utah 1977). Any document or evidence material to either guilt or punishment must be shown to the accused prior to trial. The burden is on the prosecutor to supply the evidence and it is immaterial if the Government fails in good faith to supply such evidence. It failed herein and Petitioner was denied his right to review the same.

In *Countryside Farms, Inc., supra,* we had the first notable decision concerning Rule 16. The rule had been in effect less than two months and the case makes it clear that it is the Government's obligation to afford the Petitioner an opportunity to inspect and copy all documentary evidence under its control and which the Government intends to use as evidence in the prosecution's case in chief; or which was obtained from or belonged to the Defendant. See *Countryside Farms, Inc., supra* at page 1154

The instant case fits the rule both ways. The Government intended and did manage to introduce the suppressed documentation, so harmful to the accused, into evidence, and it was represented by the Government that it obtained said evidence from the residence of Petitioner.

In *United States v. Turkish,* 458 F.Supp. 874 (1978), another conspiracy case, the District Court in New York stated unequivocally that a defendant charged with conspiracy was entitled to discovery of statements in the possession of the Government made by co-conspirators, whom the Government did not intend to call as witnesses at the trial, and defendants charged with conspiracy were entitled to discovery of documents which the Government intended to offer, or to use or to refer to in connection with testimony of any witness, on its case in chief.

(See *Turkish*, p. 875). The case mentioned *Countryside Farms, Inc., supra,* concerning identification of documents the Government intends to use at trial and the interpretation of this statement was set out as follows:

> Pursuant to Rule 16(a)(1)(C), F.R.Crim.P., the government *must* afford the defendants an opportunity to inspect and copy all documents under the control of the government which 'are intended for use by the government as evidence in chief at the trial.' This phrase has been sensibly interpreted to include not only 'documents which will be marked and offered in evidence by the government', but also documents '*which will be relied on or referred to in any way by any witness called by the government during its case in chief*'. (Emphasis added).

Petitioner made a proper timely pre-trial request for specific evidence and the suppression by the prosecutor of such evidence denied him due process. The admission of the suppressed evidence and testimony surrounding it materially affected the outcome of Petitioner's trial.

The pre-trial Rule 16 discovery request made by Petitioner and granted by the Magistrate flagged the importance of this evidence to the defense and imposed on the United States a duty to make a careful check for this evidence. The specificity of the request and failure of the Government to comply with the order given by the Magistrate is urged by Petitioner as reversible error. A reading of the record would reveal that the numbers contained on the adding machine tape, coupled with the words out of Whited's mouth, these same numbers being verbalized by other witnesses, convicted Petitioner. The failure of the agents for the Government to respond to Petitioner's request for discovery is not excusable.

A similar case to the one at bar is *United States v. Pascual,* 606 F.2d 561 (5th Cir. 1979). In *Pascual,* a letter from one of three defendants to an unindicted co-conspirator amounted virtually to a signed plea of guilty. It incriminated two other defendants and was suppressed by the Government in the face of a Magistrate's standing discovery order. This letter was declared to be a paper or document for the Government intended to be introduced (and in fact introduced) as part of its case in chief. The Fifth Circuit held that such failure to comply with the discovery order was prejudicial, compelling reversal of the conviction, and the cause was reversed and remanded for a new trial. This case, more than any other, outlined the Court's definition of a "document". It is an instrument on which is recorded in writing matter which may be evidentially used. (*Pascual* at 561).

An adding machine tape is a piece of paper containing written matter which was duly recorded and was used by the prosecution to convict Petitioner. Like the letter from Pascual to Gordon, the evidence was damaging to the accused. Like Pascual's letter, the tape was never furnished the Defendant. Both counsel for Co-defendant Garth and counsel for Petitioner assert that neither of these Defendants were furnished this document, nor the other aforementioned documents to which the Defense objected.

Petitioner, like the defendant in *Pascual, supra,* maintains that he did not know that the adding machine tape was in the custody and control of the Government by virture of the search of his residence. The tape should have been produced under Rule 16(a)(1)(C) as a paper or document which the Government intended to introduce and did introduce as a part of its evidence in chief.

Again, like *Pascual, supra,* the evidence here was in the custody of the Drug Enforcement Agents rather than in the custody of the prosecutor. This evidence should have been made available to the Petitioner.

Petitioner is aware that in the Fifth Circuit, failure to comply with Rule 16(a) is not reversible in the absence of a showing of prejudice, but the prejudice in this case is blatant.

As was held in *Pascual:*

> It would be hard to make an argument with any degree of plausibility that the use of this letter without prior production did not seriously prejudice the defendants in exercising their option to plead not guilty and in their preparation for trial. (p.565)

The adding machine tape was used by the Government to corroborate Whited's testimony concerning Petitioner's activities. Petitioner, like *Pascual,* was not caught in the prohibited criminal act. The evidence suppressed in the case at bar, when coupled with the testimony of Whited, led directly to Petitioner's conviction. Defense counsel had no opportunity to contradict it.

The combination of the suppressed tape (which was admitted), the suppressed memo pads (which were excluded but the contents were disclosed to the jury), and the suppressed telephone address books (which were excluded) were so blatantly influential on the jury that Petitioner was prejudiced to the extent he was denied his right to a fair trial.

Petitioner realizes that a determination of whether or not a particular error is prejudicial is complex as noted in 5 Am.Jur.2d, Appeal and Error, Section 783:

> The case of *Kotteakos v. United States,* 328 U.S. 750, 66 S Ct. 1239, 90 L ed 1557 teaches that 'it is not the appellate court's function to determine guilt or innocence...Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out...It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact on the thing done wrong on the minds of other men,

> not on one's own, in the total setting... If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress...But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or one is left in grave doubt, the conviction cannot stand.' *Oleander v. United States,* 210 F.2d 795, 42 ALR2d 736, 751 (9th Cir. 1954).

It was prejudicial error for the Lower Court to permit the introduction in evidence of the adding machine tape and of allowing a witness to testify from a memo pad, which was excluded. The Government failed to produce these pieces of evidence to Petitioner.

A case concerning the effect of such suppression on defense strategy is *United States v. Padrone,* 406 F.2d 561 (1969) where Defendant testified at trial, without the knowledge of defense counsel that the Government had prior statements of the accused, a copy of which were not furnished counsel.

In the case at bar, Petitioner's counsel was unsuccessful in keeping the tainted evidence from the jury. Had the Government provided the evidence to Petitioner's counsel pursuant to the pre-trial discovery order, Defense counsel would have had the opportunity to thoroughly investigate it and prepare defense strategy accordingly, whether it would have been contradictory testimony or otherwise. Clearly, prior knowledge would have allowed for a more thorough cross-examination of both Whited and Taylor.

When one considers the devastating effect the mention of the amount of $5,700.00 eighteen (18) times had upon the jury, with the defense counsel having no previous knowledge of such a number, then one can fully appreciate what the availability of this evidence to the accused prior to trial would have had with regard to trial strategy. It is similar to prejudicial pre-trial publicity. It filters into the minds of the jurors and is recalled as they hear testimony. No seasoned trial lawyer, after many hours of preparation for trial, can escape the desolute feeling of helplessness when, during a trial, hard evidence allegedly connecting an accused with the crime is allowed before the jury. The whole tactical approach of the defense to the case is altered. We agree with the Lower Court's statement that man is not entitled to the most perfect of trials, but what does justice require? Did Petitioner and Garth receive a fair trial under the facts and circumstances? The evidence admitted, the adding machine tape, and the words enlightening the jury about the other pieces of evidence, which were not admitted, established the connection between the crime and the accused. This is a case where the Government presented primarily one witness, an alleged co-conspirator, to prove its case in chief. That witness' testimony, taken alone, without these corroborating bits and pieces of evidence, was not sufficient for conviction and the United States knew this.

It is Petitioner's position that he was seriously prejudiced by the Government's actions. Defense strategy for trial was prepared without the benefit of the evidence initially supressed. Knowledge of such was imperative to a thorough cross-examination of the Government's witnesses.

The defense strategy in *Padrone* was similar to the strategy in Petitioner's case. Argument was made to the jury that Petitioner had no knowledge of the cocaine or its source; that inspection of the trailer contained no evidence of cocaine; that no tri-beam scales were found after a thorough search. There was only one person who attempted to implicate Petitioner and that

was Whited. He was a known drug addict who agreed to testify for aid to himself. His testimony, at best, is subject to an automatic instruction because of the Court's historic sensitivity to whether or not such testimony is always accurate.

Petitioner believes he was denied a fair trial because of the Government's non-compliance with the discovery order. Such non-compliance with a discovery order was touched on in *Padrone, supra,* as follows:

> We believe that noncompliance with an order to furnish a copy of a statement made by the defendant is so serious a detriment to the preparation for trial and the defense of serious criminal charges that where it is apparent, as here, that *his defense strategy may have been determined by the failure to comply, there should be a new trial.* (Emphasis added).

Petitioner asserts that the failure to make the type evidence complained of here available to a Defendant prior to trial violates the due process clause of the Fifth Amendment. In support of this position Petitioner cites the case of *United States v. Lewis,* 511 F.2d 798 (1975) which addressed the issue of non-compliance with discovery. Defense counsel told his client to take the stand, not having knowledge of the tainted evidence, and the Court held:

> Under all the circumstances the trial judge should have excluded any reference to the defendant's oral statement, whether presented on the government's case or brought forth in any way at a later stage of the trial.
>
> Had Fabrikant not been misled with respect to whether Lewis had made any relevant and possibly incriminating statement upon arrest, his trial preparation and strategy might well have been different, especially as he might have been able to have the court require the government to disclose the substance of the statement...

In the case at bar, counsel for Petitioner was denied the opportunity to investigate whether or not the adding machine tape in question did in fact come from the adding machine in Petitioner's house. Petitioner was obviously prejudiced by the District Court's actions in the admission of the tape and the testimony concerning the other evidence which could not be erased from the jurors' minds.

The failure to produce the discovery requested by the petitioner denied him a fair trial. The evidence, when viewed in the light of testimony of all the witnesses, was prejudicial to the substantial rights of Petitioner. Rule 16 F.R.C.P. was violated and Petitioner submits that sufficient prejudice has been shown to require a reversal. One cannot deny the materiality of the suppressed evidence. It was the smoking gun in the prosecutor's arsenal and certainly the investigation of same would have been material to the preparation of the Petitioner's defense.

CONCLUSION

It is the contention of Petitioner that the introduction of a highly prejudicial document, suppressed by the Government in the face of a discovery order, together with inflamatory testimony regarding documents kept from the jury by proper objection and the sustaining of same, all contributed to the verdict of guilty.

The injection into the trial of inadmissible testimony concerning evidence which was allowed for identification only resulted in cloaking Petitioner with an apparent aura of criminality. It prejudiced his right to a fair and impartial trial and contributed materially to his conviction.

The case is most analagous to *United States v. pascual*, 606 F.2d 561 (5th Cir. 1979), and we urge this Court to review the same. That case was reversed for similar reasons as exist in the one at bar. Petitioner was denied his right to review the evidence to be introduced against him in order that he have the opportunity to defend himself, if he can.

For these reasons and the reasons cited throughout this Petition, Petitioner respectfully requests that this Court entertain a decision to reverse the findings of the Lower Court.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE

The undersigned counsel for Petitioner certifies that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari have this day been forwarded by United States mail, postage prepaid, to Honorable James B. Tucker, Assistant United States Attorney, United States Post Office Building, Third Floor, Jackson, Mississippi 39201.

This the 6 day of April, 1984.

ALVIN M. BINDER

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4444
Summary Calendar

United States of America,
Plaintiff-Appellee

v.

Vernon Lee Mullen and
Anse Garth
Defendants-Appellants

Appeals from the United States District Court for the
Southern District of Mississippi

(February 13, 1984)

Before RUBIN, JOLLY and DAVIS, Circuit Judges

Per Curium:

Appellants, Vernon Lee Mullen and Anse Garth, were found guilty by a jury of conspiracy to distribute and/or possess with intent to distribute cocaine and marijuana, in violation of 21 U.S.C. Section 846. Each appellant received a 12-year sentence; Mullen was fined $15,000.00 and Garth was fined $10,000.00. On appeal, each argues that he is entitled to a new trial because of the prosecution's failure to disclose to defense counsel prior to trial the existence of an adding machine tape, and address

book and memorandum pads, pursuant to Rule 16(a)(1)(c) of the Federal Rules of Criminal Procedure.[1] In addition, Garth contends that his sentence resulted from the trial court's abuse of discretion. We find no error and affirm.

The facts of this case begin in April 1981 when Kevin Harrison, an undercover agent of the Louisiana State Police, contacted Gary Whited in Louisiana about purchasing marijuana and cocaine. Whited contacted his source in Mississippi and made arrangements to purchase 100 pounds of marijuana for $32,000 and several ounces of cocaine for $1,900 per ounce. On May 4, Whited, agent Harrison and Drug Enforcement Administration (DEA) agent Dave Gorman flew from Louisiana to an airstrip in Copiah County, Mississippi, where they were met by Garth.[2] Whited and Garth left to meet the supplier Vernon Mullen to obtain the cocaine. Whited and Garth returned to the airport and gave the agents three ounces of cocaine, and both Garth and Whited were arrested. Whited then agreed to cooperate with the authorities and, at the request of the narcotics agents, Garth telephoned his supplier, Vernon Mullen, and engaged in the following recorded conversation:

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[1] Rule 16(a)(1)(c) provides:

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

[2] Law enforcement agents from the DEA and the Mississippi Bureau of Narcotics had surrounded the airport and had the area under surveillance.

Hello: Woman's Voice

Whited: Is Vernon there.

Mullins [sic]: Hello

Whited: Hello, Vernon

Mullins: Hey

Whited: This is Whited. Ance had a flat down the road there so I come back up here and called. They went ahead and took that did you hear anything else on that?

Mullins: Not right yet I haven't

Whited: Nothing yet on that. He said whenever it comes in give him a holler down there.

Mullins: Where are you now?

Whited: About ½ mile there past the airport coming back in.

Mullins: Which way you coming in?

Whited: Same way we came before.

Mullins: Is he getting a tire fixed?

Whited: Yeah

Mullins: Where did he get it fixed at?

Whited: He had a spare.

Mullins: Are ya'll on the way in?

Whited: Yeah

Mullins: Ok

Whited: Ok is the price still the same on that?

Mullins: Yeah

Whited: Ok, see you later. See you in a little bit.
(Exhibit G-3)

Law enforcement officials then proceeded to Mullen's house, where they conducted a permissive search. During the search, Mullen denied that he knew Whited. Although the search did not reveal any contraband, it did produce several items of drug paraphenalia, a tape in the adding machine with the figures 1,900 repeated three times in a column and showing a total of 5700, several address and memorandum books, and various other items.

Prior to trial, defense counsel obtained discovery under Rule 16 of the Federal Rule of Criminal Procedure (F.R.Cr.P.)[1]

At the time of trial, Whited and various law enforcement officials testified for the prosecution. Whited testified that he purchased the cocaine from Mullen, that he had purchased cocaine from Mullen on several previous occasions and that Garth assisted him in the cocaine purchase on May 4. During the trial, the prosecution noted several times that three ounces of cocaine had been purchased at $1,900 an ounce, for a total of $5,700. The government offered the adding machine tape obtained from Mullen's home to corroborate Whited's testimony. The prosecutor also offered a memo pad and address book which contained Whited's name and telephone number. Defense counsel objected to the offerings on the ground that these documents had not been produced in accordance with Rule 16(c) F.R.Cr.P. The prosecution asserted that a DEA agent had shown the proffered documents to defense counsel at a pretrial discovery conference. Defense counsel admitted that the exhibits were listed on the exhibit list but denied that they were shown to them. The district court overruled the objection to the adding machine tape on grounds that it was not a document. the

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[1] Garth joined Mullen in all defense motions, including discovery, by agreement of all parties.

trial judge sustained the objection to the introduction of the address book and memo pad and instructed the jury to disregard the testimony relating to these documents.

Since the objection to the introduction of the address book and memo pad was sustained and cautionary instruction given to the jury, defendant's argument of error with respect to these documents is clearly meritless.

The adding machine tape was listed on the exhibit list furnished to defense counsel. The exhibit was introduced during the presentation of the government's case in chief and defendants had some opportunity to respond to the evidence. Clearly, the adding machine tape was either a document, paper or tangible object under Rule 16 and should have been produced by the government. In view of the overwhelming evidence of defendant's guilt, the marginal value of the tape to the prosecution, defense counsel's knowledge of the existence of the tape and the timing of the government's offering, the error in admitting the tape did not prejudice substantial rights of the accused, See *United States v. Valdes,* 545 F.2d 957, 961 (5th Cir. 1977), *United States v. Gonzales,* 661 F.2d 488, 494 (5th Cir. 1981), and does not require reversal.

Appellant Garth pled guilty to a charge under Mississippi law for the unlawful delivery of a controlled substance arising from the May 4, 1981 incident. He received a five year sentence and served 14 months before being paroled. Garth argues that the total time he is required to serve under both the state and federal charges render his federal sentence either cruel and unusual punishment or an abuse of discretion.

The state and federal governments constitutionally may each impose a sentence on a defendant "based on the commission of a single act constituting offenses under both state and federal law." *United States v. Shillingford,* 586 F.2d 372, 375 (5th Cir. 1978). It is long settled that a conspiracy to commit an offense and the actual commission of the offense are separate and

distinct crimes, and thus, Garth could properly be prosecuted for conspiracy in federal court and unlawful delivery of a controlled substance in state court. *Pereira v. United States,* 347 U.S. 1, 11, 74 S. Ct. 358, 364, 98 L.Ed. 435, 445 (1954).

Garth has the burden of proving facts which would show either an illegal sentence or an abuse of discretion by the trial court. Since Garth offers no facts other than his state conviction and the imposition of a fine to demonstrate an abuse of discretion, and since Garth's sentence was well within the statutory bounds for his offense, he has failed to meet his burden. *United States v. Gray,* 565 F.2d 881 (5th Cir.) *cert. denied,* 435 U.S. 955, 98 S. Ct. 1587, 55 L.Ed. 2d 807 (1978), *Thomas v. United States,* 368 F.2d 941 (5th Cir. 1966).

Affirmed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4444

United States of America,
Plaintiff-Appellee,

v.

Vernon Lee Mullen and Anse Garth,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Mississippi

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 2/13/84, 5 Cir., 198 , _____F.2d_____)

(March 12, 1984)

Before RUBIN, JOLLY and DAVIS, Circuit Judges.

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

W. Eugene Davis
United States Circuit Judge